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SUPREME COURT, U.S.

RALPH MILLS	*	IN THE
Petitioner	*	SUPREME COURT
v.	*	OF THE UNITED STATES
STATE OF MARYLAND	*	October Term, 1987
Respondent	*	No. 87-5367

* * * * * * *

ANSWER TO PETITION FOR WRIT OF CERTIORARI

The State of Maryland, Respondent, by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Richard B. Rosenblatt, Assistant Attorney General, in answer to the petition for writ of certiorari filed herein, states that the writ should be denied, further review being neither desirable nor in the public interest.

QUESTIONS PRESENTED

1. Whether the interpretation of the Maryland capital punishment statute is a question of State law inappropriate for review by this Court?

2. Whether the Maryland capital punishment statute adequately permits the consideration of evidence in mitigation so as to preclude a finding that the statute is unconstitutionally mandatory?

3. Assuming that this Court elects not to reconsider its decision on the admissibility of victim impact evidence, whether the Maryland Court of Appeals properly determined that reversal based upon the introduction of victim impact evidence was not required?

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING THE WRIT

I. and II.

NEITHER THE INTERPRETATION OF THE MARYLAND CAPITAL PUNISHMENT STATUTE, NOR THE ALLEGATION THAT THE STATUTE IS MANDATORY WARRANTS REVIEW BY THIS COURT.

Petitioner does not contend, as he cannot, that there is any restriction in the Maryland capital punishment statute to preclude the introduction of evidence in mitigation of sentence. Instead, Petitioner asserts that where there is a lack of unanimity, the application of the statute is unconstitutionally mandatory because a sentencing jury must unanimously agree that at least one mitigating circumstance is present before a balancing process is triggered. Petitioner is in error for two separate reasons: (1) the type of "mandatoriness" asserted by Petitioner resulting from the rejection of all mitigating factors as matters of fact is not the type of "mandatory" penalty proscribed by the decisions of this Court; and (2) the finding of a mitigating factor by a single juror can preclude the imposition of a death sentence without unanimity under the Maryland capital punishment scheme. As a result, there is no constitutional infirmity, and review should be denied.

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court found unconstitutional a North Carolina statute that punished all first degree murder with death. Thus, the "mandatory" statute held unconstitutional in that case required an automatic death sentence whenever a first degree murder

conviction was obtained. This Court found one of the statute's constitutional shortcomings to be the failure to allow "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303. Recently, this Court again rejected a death penalty statute that did not permit the consideration of the individual characteristics of the crime and the defendant, even for the narrow class of murders committed by persons then serving sentences of life without the possibility of parole. Sumner v. Shuman, ___ U.S. ___, 97 L.Ed.2d 56 (1987).

This Court has consistently taken the position that in capital punishment cases, the right to an individualized sentence is not an empty guarantee. Thus, in Lockett v. Ohio, 438 U.S. 586 (1978), a death sentence was vacated because the statute under which it was imposed critically limited the range of mitigating circumstances that could be considered by the sentencer in determining whether death was appropriate. A similar legal restriction on the consideration of evidence in mitigation was found to require the vacating of the death sentence in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Eddings, the sentencing judge stated that he could not "consider the fact of this young man's violent background." 455 U.S. at 113. The Oklahoma appellate court concurred, reasoning that evidence in mitigation was limited to that "which would tend to support a legal excuse from criminal liability." Id. In reversing, this Court stated:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

Id. at 113-14 (emphasis in original).

Applying these concepts to the instant case, it is clear that there was no constitutional infirmity in Petitioner's sentencing proceeding. Certainly, a death sentence was not automatically to be imposed upon conviction for the murder as in Woodson or Shuman. Moreover, under the Maryland Court of Appeals' interpretation of the statute, there was no limitation on the consideration of evidence. The Maryland Court of Appeals has interpreted the Maryland statute to the benefit of the defendants such that "no" is to be marked only where there has been a unanimous rejection of the particular mitigating factor. If there is a lack of unanimity on both "yes" and "no," both are to be left blank and a weighing process is to be undertaken. Thus, it is only where each mitigating factor is unanimously rejected that no weighing occurs and the sentence is "automatically" death. Certainly, under this interpretation, there is no unconstitutional restriction on the consideration of evidence in mitigation.

Relying upon "human experience", Petitioner asserts that no sentencing jury prior to the decision in this case was aware that it could leave the "yes" and "no" blank for a particular mitigating circumstance and proceed to the weighing function. As a result, Petitioner claims the State may not seek solace from this interpretation. However, assuming that the jury was unaware

that it could leave a finding with respect to a particular mitigating factor unresolved, the result would be a hung jury. It is inconceivable that a juror who would have found that a mitigating factor had been demonstrated would simply surrender his belief and affix his signature in agreement with a sentence of death. Under Maryland law, if a jury is unable to agree within a reasonable period of time, the sentence to be imposed is life. Md.Ann.Code, art. 27, §413(k)(2). Thus, the alleged ignorance of the jury cannot benefit Petitioner.

Moreover, even if the Maryland Court of Appeals' interpretation is rejected and Petitioner's interpretation adopted, there is no constitutional infirmity as no restriction was imposed upon the consideration of evidence in mitigation as a matter of law, as in Lockett (statute) or Eddings (judicial interpretation). Instead, the instant case presents a situation where the sentencer, after a full and fair consideration, rejects a mitigating factor as a matter of fact. Under the Maryland scheme, mitigating factors are much like affirmative defenses. This Court has acknowledged that a defendant may be required to shoulder a burden of proof on an affirmative defense. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, ___ U.S. ___, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). In the case of an affirmative defense, where the case is tried to a jury, the unanimity requirement applies. The failure of a jury to find that the affirmative defense has been shown is not synonymous with precluding consideration of the defense as a matter of law; it is simply a rejection as a matter of fact. The same situation

is present here. As a result, Lockett and Eddings are not offended by the "mandatory" imposition of a death sentence where no mitigating factors have been demonstrated by a preponderance of the evidence to the unanimous satisfaction of the sentencer.

Under the above rationale, the Constitution is not offended regardless of the interpretation of Maryland law. Whether a jury marks "no" because the jury unanimously believes that a particular mitigating factor has not been established, or whether the jury marks "no" because of a lack of unanimity on "yes" (whether the mitigating factor had been established), there is still no constitutional restriction on the consideration of mitigation evidence that would run afoul of Lockett and Eddings.

The interpretation of a state law generally is a matter on which this Court will not intervene. It is only in those circumstances where the State court interpretation appears to be an "obvious subterfuge to evade consideration of a federal issue that this Court will intervene." Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975). A review of the decision of the Maryland Court of Appeals reflects no such subterfuge to evade consideration of any federal issue. As a result, the interpretation of the statute by the Court of Appeals must be given due consideration, and under that interpretation, there is clearly no constitutional deficiency. Moreover, even if the interpretation by the Maryland court is rejected, and the interpretation urged by Petitioner of Maryland law adopted, there remains no restriction on the consideration of evidence in mitigation and, thus, no need

for additional review. Under these circumstances, the petition for writ of certiorari should be denied.

III.

REVERSAL IS UNWARRANTED ON THE BASIS OF THE INTRODUCTION OF EVIDENCE CONCERNING THE VICTIM.

The State of Maryland continues to submit that the introduction of evidence in the form of the impact of the crime on the victim is a proper "circumstance of the crime" relevant to a sentencer's determination of whether the sentence for a murder should be life or death. The State of Maryland urges this Court to reconsider in this case the holding of Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987).

Alternatively, the State submits that the Maryland Court of Appeals was correct in holding that the introduction of evidence concerning the character of the victim did not warrant the setting aside of the death penalty in this case. Unlike Booth, no evidence was introduced in this case concerning the overflow impact of the death on members of the family. Instead, the evidence was limited to the character of the victim. While the impact on a victim's family may be of questionable relevance, evidence limited to the character of the victim is not so irrelevant.

Further, although the issue was considered by the Maryland Court of Appeals sua sponte, the court did note that there was no objection raised at the sentencing to the introduction of the evidence, and no issue concerning the propriety of introducing the evidence was raised on appeal. The importance of full

briefing and argument becomes evident when the totality of the circumstances are considered. Assuming that the introduction of the evidence was inconsistent with Booth, such error was undoubtedly harmless. As noted above, any prejudice was minimized by limiting the evidence to the character of the victim and not the overflow impact on the victim's family. Moreover, as this Court noted in Booth, 96 L.Ed.2d at 449, victim impact evidence is not relevant to any particular aggravating or mitigating circumstance. Indeed, as the State argued in Booth, it is a circumstance of the crime relevant only in the weighing process. However, here, there was no weighing process as no mitigating factors were found. Inasmuch as the jury in this case considered only whether an aggravating factor was present, and whether any mitigating factors were present, and did not conduct any type of weighing, there could have been no consideration of the evidence concerning the victim's character, and thus no basis for reversal. Under these circumstances, review by this Court is unwarranted, except for the purpose of reconsidering the decision rendered in Booth v. Maryland, supra.